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No. 681

In the Supreme Court of the United States

OCTOBER TERM, 1957

STANLEY S. HECHT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General.
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OPINION BELOW

The *per curiam* opinion (R. 59–60) of the Court of Appeals is reported at 248 F. 2d 544.

JURISDICTION

The judgment of the Court of Appeals was rendered on October 23, 1957 (Pet. App. 15, R. 61). The time for filing a petition for a writ of certiorari was extended by Mr. Justice Harlan to December 23, 1957, and the petition for a writ of certiorari was filed on that date. The jurisdiction of this Court was invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether there was sufficient evidence to support the trial court's finding of contempt for nonproduction of records.

STATEMENT

Petitioner was president and sole stockholder of World Over Trade Export Corporation. He was found guilty of contempt in June, 1957, in the United States District Court for the Southern District of New York in a proceeding under Rule 42 (b), F. R. Crim. P., for failure to produce before a grand jury in March, 1957, as directed by a subpoena duces tecum, all the corporate books and records for the calendar years 1956 and 1957 (up to the time of serving the subpoena), including all correspondence, invoices, and all data relating to the operation of the corporation (Gov. Exs. 1 and 2; Tr.[1] 77, 147–148). The contempt action was not based on petitioner's refusal to answer questions concerning the records before the grand jury where he invoked the Fifth Amendment,[2] but solely on his failure to produce records specified in the subpoena. He was sentenced to a term of imprisonment of 90 days (Tr. 148). On appeal, the Court of Appeals affirmed *per curiam* (R. 61).

The evidence adduced at the contempt hearing may be summarized as follows:

The subpoena was issued in connection with a grand jury investigation of the purchases by World Over Export Trade Corporation of merchandise which it eventually sold to Vietnam and Cambodia, in transactions financed by the International Cooperation Administration. After an initial refusal, and only after

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[1] The designation "Tr." refers to the stenographic transcript of the trial proceedings.

[2] See the typewritten transcript of the May, 1957, proceedings before the grand jury.

the subpoena had been issued, petitioner permitted F. B. I. agent Mulroy to examine the corporation's books and records (Tr. 62–64). Mulroy found that the records were fairly complete with respect to the transactions between World Over and its far eastern customers, but he could not locate any of the records, including the cancelled checks, relating to the purchase of the exported merchandise from suppliers in this country (Tr. 64–70). From the cash disbursements book, the agent could find the names of the suppliers to World Over, but he was unable to locate from such names alone the purpose of the disbursement or the location of the supplier (Tr. 73–76). Cancelled checks to suppliers were also found, but not the checks for supplies later sent to Cambodia and Vietnam. The agent also testified that there were papers and magazines on the floor, but that none of these papers were corporate records as such. (Tr. 67–69.)

At the grand jury hearings, petitioner could not explain the loss of these documents except to say that the charwoman may have come around and thrown them away (Tr. 69).

Witness Cohn testified that he had been employed by World Over from March, 1956, until February, 1957, to work in the office and also to make purchases. He was its sole employee most of the time during that period (Tr. 16, 28). He said that, with respect to all purchases by World Over, he prepared purchase orders, a copy of which was usually returned by the supplier with his acceptance. The suppliers also sent invoices of shipped material to

the corporation. The purchase orders, the acceptances, the invoices, and the covering letter customarily sent with the check for the payment of the merchandise, were usually filed by him in the file cabinet, together with all the other material pertaining to the transaction (Tr. 21–26).

As bearing on the question of petitioner's wilfulness, Cohn was allowed to testify that usually the material purchased for a far eastern customer was of an inferior quality (Tr. 27–28), and in most cases the yardage shipped to the far east was less than required by the order (Tr. 29). Mr. Cohn spoke to petitioner about this and petitioner said that he had "confidential correspondence" with the customer covering this matter at home. This arrangement was indicated in each order by an attached slip of paper which stated that the customer was to be billed for the full amount and "differences" would be arranged between them (Tr. 29–30). In some cases, the yardage varied from 20 or 30 percent less than ordered to as much as 70 percent less (Tr. 31).

Mr. Cohn said that as long as he worked for the corporation all of the papers relating to the far eastern transactions, including all of the transactions with the suppliers, were placed in the corporation's file cabinet (Tr. 31–32). He also said that, during his employment, petitioner had two other employees, one part-time, but they had nothing to do with the file (Tr. 36, 50).

At the conclusion of the government's case, petitioner indicated that he would submit no proof. The court said that the government had presented a *prima*

facie case and, that unless petitioner could explain the reason for the missing files, he would hold him for contempt, and the court so held (Tr. 79–80, 104). In order to purge himself of the contempt, petitioner testified. He attributed the loss of the documents to Mr. Cohn's slipshod manner in placing them in bundles on the floor, and said that the charwoman would throw them away. He said that, when he complained to the building superintendent about this, the superintendent told him that the charwomen were told to clean up and throw away papers left on the floor. Petitioner denied that he had destroyed any of the missing papers. He said that he had not seen any of the documents since the preceding December or January when he gave them to one of his accountants (Tr. 119–125, 142–143). On cross-examination, he said that none of his accountants ever took the records in question out of the office (Tr. 134–136). In answer to a question as to whether he could explain the loss of all the papers relating to his company's purchase of the merchandise shipped to Viet-Nam and Cambodia, petitioner said "No" (Tr. 139–140).

The court did not feel that petitioner's testimony warranted a reversal of its earlier holding of contempt. In the trial judge's view, it was incredible that the papers could disappear in the manner described by petitioner (Tr. 144–145).[3]

[3] The court also requested the government to have the F. B. I. interview the building superintendent, the charwoman, and the accountants in order to determine if there was any basis for petitioner's claim. Neither the record nor the transcript show anything further on this point (Tr. 144–145).

ARGUMENT

As the court below indicated (R. 59–60), the instant case is very similar to *United States* v. *Johnson*, 247 F. 2d 5 (C. A. 2), certiorari denied, November 12, 1957, No. 418, this Term, which also raised a question of the sufficiency of the evidence to support a conviction for contempt for nonproduction of corporate records.

This case is even stronger than *Johnson*. There, the existence of the records at the time the subpoena was served was inferred from the careful bookkeeping system testified to by the government witnesses. Here, there was not only testimony of a careful bookkeeping system, but direct testimony by the then custodian of the books of the existence of the records within a month of the time of the service of the subpoena. In *Johnson*, there was some evidence of a fire and civil litigation which, while not found sufficient to explain nonproduction, at least raised something of an issue. Here, there was absolutely no reasonable excuse why all the documents relating to the purchase of supplies eventually sold to Vietnam and Cambodia were missing, while those relating to the sale and shipment of such materials to Vietnam and Cambodia were left intact. Petitioner's attempt to explain the loss on the ground that the charwoman might have thrown them away resists all credulity, particularly here where the destruction appeared to be so systematic and selective.[1] In short, even more

[1] The fact that the judge ordered a further investigation does not cast doubt on the judge's decision of contempt. In his own words (Tr. 114–115) the judge was making certain that

than in the *Johnson* case, the trier of fact had the right to believe that carefully kept corporate records, which were shown to be in existence shortly before the subpoena was served, did in fact continue in existence up to the time the subpoena was served. The motive for nonproduction of this selected group of records was also shown.[5] The finding of wilful nonproduction was therefore amply justified.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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petitioner was given every reasonable opportunity to explain the loss of the documents. That the government did not produce evidence as to the results of such interviews is not proof that the interviews, if any, were favorable to petitioner. These witnesses were available to petitioner, and he probably would have used them had he felt that they were favorable to him.

[5] The suggestion (Pet. 9, 13) that the F. B. I. agent's removal from petitioner's office of some 700 documents was sufficient compliance with the subpoena overlooks the fact that a group of documents important to the investigation, not just one or few random items, were missing when he was finally allowed to examine the documents. These missing documents were adequately described in the subpoena which petitioner did not attack in the district court. Petitioner, as is evident from his testimony, knew what those documents were.